LIBRARY
SUPREME COURT, U. S.

FILED
MAR 25 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 68

No. 399

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,

Defendants-Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

FRANK S. HOGAN
District Attorney
New York County
Attorney for Respondent
155 Leonard Street
New York, New York 10013

H. RICHARD UVILLER
FREDERICK P. HAFETZ
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Questions Presented	2
The Statute Involved	2
Statement	3
The Evidence	3
The People's Case	3
The scene prior to the police orders to disperse	3
The orders to disperse and subsequent events	5
The Defense	10
Summary of Argument	17
Point I—New York's disorderly conduct statute, as construed by its courts and as applied here, does not infringe upon the rights of the defendants under the First and Fourteenth Amendments	18
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Adderley v. Florida, 385 U. S. 39 (1966) 21

Cantwell v. Connecticut, 310 U. S. 296 (1940) 21
Chaplinsky v. New Hampshire, 315 U. S. 568 (1942) 25
Cox v. Louisiana, 379 U. S. 536 (1965) 21, 23, 24, 25
Cox v. New Hampshire, 312 U. S. 569 (1941) 21, 22, 23

PAGE

Edwards v. South Carolina, 372 U. S. 229 (1963) 24, 25

Feiner v. New York, 340 U. S. 315 (1951) 20, 21, 24

Hague v. CIO, 307 U. S. 496 (1939) 21

People v. Carcel, 3 N.Y.2d 327 (1957) 25, 26
People v. Feiner, 300 N.Y. 391 (1950) 19, 24
People v. Galpern, 259 N.Y. 279 (1932) 19
People v. Most, 171 N.Y. 423 (1902) 25
People v. Nixon, 248 N.Y. 182 (1928) 19
People v. Penn *et al.*, 48 Misc.2d 634 (App. Term, 1st Dept. 1964), aff'd 16 N.Y.2d 581 (1965), *cert. denied*, 383 U. S. 969 (1966) 19
People v. Perry, 265 N.Y. 362 (1934) 25

Schneider v. State, 308 U. S. 147 (1939) 21
Shuttlesworth v. Birmingham, 382 U. S. 87 (1965) 20, 21, 22

Constitution and Statutes:

New York Penal Law, Section 722 ..... 2, 3, 17, 19, 24, 25, 26
United States Constitution, Amend. I 2, 18
United States Constitution, Amend. XIV 18

Periodicals:

Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. Jour. 877 (1963) 21

IN THE

Supreme Court of the United States

October Term, 1966

No. 399

WILLIAM TURNER, ALBERT MAHER, LEVI LAUB, RICHARD RHOADS, THEODORE OSTROW, JOYCE CHADWICK, ELLEN SHALLIT, ARTHUR KUNIS, BRUNO ECKHARDT, VINCENT COPELAND, JEREMIAH GELLES, ANN KYLLINGSTAD, PIERRE MEISNER, FRED JEROME, JEREMIAH TEAHAN, KEY MARTIN, ROBERT APTER,

Defendants-Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

Opinions Below

The trial court did not deliver an opinion. The opinion of the Appellate Term is reported at 48 Misc. 2d 611 (1st Dept. 1965). The affirmance of the Court of Appeals, without opinion, is reported at 18 N. Y. 2d 683 (1966).

Questions Presented

(1) Did the Constitution's guarantees of free speech and assembly preclude police from ordering the dispersal of a political protest meeting held in Times Square, after observing that the gathering substantially interfered with pedestrian and vehicular traffic in the area?

(2) Are Sections 722 (2) and 722 (3) of New York's Penal Law unconstitutional on their face or as applied to convict of disorderly conduct those members of an assembly who refused to move on in obedience to a reasonable police order, and who acted in a manner which disturbed and obstructed others?

(3) Did the petitioners receive adequate notice of the charges in the complaint which alleged a failure to obey a police order to move on?

The Statute Involved

The relevant portions of Section 722 of the New York Penal Law provide:

"Disorderly Conduct.

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

• • •

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;

"4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd;"

Statement

On August 8, 1964, a complaint was filed against the defendants in the Criminal Court of the City of New York, charging them with disorderly conduct in violation of New York Penal Law, Section 722, Subdivisions 2, 3 and 4 (R. 1).* On October 2, 1964, after a joint trial, defendants were found guilty as charged (IMPELLITTERI, J.), and on November 18, 1964, sentence was imposed (R. 278, 279). Defendants Maher, Laub, Rhoads, Ostrow, Shallit, Copeland and Teahan were sentenced to pay a fine of twenty-five dollars or, in default thereof, to serve five days in jail. The remaining defendants received suspended sentences (R. 279).

On appeal, the Appellate Term, First Department, affirmed the judgment with an opinion (R. 284-314). The Court of Appeals affirmed the order of the Appellate Term. Certiorari was granted by this Court on October 24, 1966.

THE EVIDENCE

The People's Case

The scene prior to the police orders to disperse

At about 4 p.m. on Saturday, August 8, 1964, approximately 200 to 300 persons were gathered on Duffy Square, a concrete island extending from 46th to 47th Streets between Broadway and Seventh Avenue (Behr, R. 5, 11;

* References, unless otherwise indicated, are to pages of the Transcript of Record in this Court.

Walsh, R. 90, 95; Koopman, R. 108). Bearing placards, the group loudly chanted, "Down with American Imperialism. Stop the war in Vietnam," accompanied by defendant Eckhardt's beating on a large kettle drum; several paper effigies had been set up on a sidewalk portion of the Square by Eckhardt and the defendant Kunis (Behr, R. 10; Koopman, R. 108, 110). Shortly after 4 p.m. the defendants Laub, Luce, Copeland and Maher mounted steps leading to a statue at the northern end of the Square and Laub, through an electric megaphone, addressed the crowd (Behr, R. 5, 11; Koopman, R. 107).

As Laub began to speak, the group "jamming" toward him, covered the width of the Square "from side to side" and began "spilling out into the street" (Behr, R. 12, 26-7; Koopman, R. 110). Automobiles were "veering sharply to the right on Broadway and to the left on Seventh Avenue to avoid" demonstrators in the street—including Eckhardt, Kunis and Kyllingstad—and pedestrians whom the demonstrators, blocking the sidewalks on the Square, had forced into the street (Behr, R. 12; Walsh, R. 90; Koopman, R. 110). Thus compelled to walk in the street, pedestrians complained to several police officers present (Behr, R. 21-2). Other "pedestrians couldn't get through the street to the bus stop" on the Square (Walsh, R. 90). On the Broadway and Seventh Avenue sidewalks opposite the Square were approximately 4,000 to 5,000 pedestrians, several thousand stopping to look at the demonstrators (Behr, R. 14; Koopman, R. 108-9, 115).

The orders to disperse and subsequent events

Detective **Fritz Behr** testified that after Laub spoke briefly, introducing the defendant Luce, a police inspector and a police captain approached Laub, Luce, Copeland and Maher at the stairs to the statue (R. 8). The captain informed them that because the demonstration was interfering with pedestrian and vehicular traffic, the meeting would have to be terminated (R. 9). Laub then took the megaphone from Luce and told the crowd:

> "The captain standing on my left, I think he should be standing on my right, has informed me that we can't continue our peaceful demonstration here" (R. 9).

He then stated that, nevertheless, the demonstration would continue; and he returned the megaphone to Luce who spoke briefly and in turn introduced Copeland (R. 9). Copeland stated that "if everybody stayed there and protested to the utmost, that the police department wouldn't do anything about their meeting" (R. 10).

At this point the police captain again approached Laub, Luce, Copeland and Maher, and repeated his order to disperse (R. 10). Taking the megaphone, Laub again urged the group not to disband (R. 10). The crowd began chanting, "Let him speak. Let him speak" (R. 18). The captain signalled fifteen policemen, including two on horseback, over to the Square (R. 20-21). Behr further testified that the defendant Maher struck one of the horses several times with a rolled-up placard (R. 18).

Patrolman **Henry Campbell** testified that after the captain directed Laub to break up the meeting and Laub urged the crowd to stay, "Then the whole crowd started to run all over the place and they were running in the gutter and on the sidewalks (R. 63-5). Campbell approached Laub on the sidewalk of the Square and told him several times to move on (R. 65-6). Laub refused and was then placed under arrest (R. 66).

Patrolman **Joseph Hines** testified that after the police captain spoke to the defendants at the stairs to the statue, Copeland ran back and forth across the Square with a loudspeaker, calling persons over to him (R. 68-9). He was arrested after he again mounted the steps to the statue and refused to leave the area (R. 69).

Patrolman **Donald Walsh** testified that after the police captain told the speakers to break up the meeting, the defendant Apter began:

> "running from the sidewalk to the street, back and forth, speaking to the crowds, telling them not to obey our orders to get back on the sidewalk and to make openings for pedestrians" (R. 88). Walsh told Apter "Stop telling them this and behave yourself" whereupon Apter ran out in the street, yelling to the crowd "Stay where you are" (R. 88-9).

Placed under arrest, Apter threw himself down on the Square and screamed "brutality, fascist police" (R. 89). As the officer attempted to get him up, the defendants Teahan and Martin intervened, pulling on Apter and shouting "Police gestapo" (R. 89-90). Told to move on, Teahan

and Martin refused, whereupon they were placed under arrest (R. 90).

Detective **Francis Koopman** and Patrolman **Robert Annitto** both testified that after the speakers were ordered to break up the meeting, Maher began running around the Square waving a placard, and when mounted policemen arrived on the scene, Maher "ran over to one of the horses and started smacking it" with a placard (R. 38, 110). Annitto testified that the officer kept the horse under control (R. 99), while Koopman stated that the horse reared up on its hind legs when struck (R. 113). Annitto also testified that he observed the defendant Turner standing on the sidewalk in front of two policemen, "trying to keep them" from bringing another of the defendants into a police car (R. 100). Turner was hollering, "Leave them alone" and "fascist police" (R. 99-100).

Patrolman **George Knoll** testified that he approached the defendants Gelles and Turner and a third person who were standing close together on the sidewalk of the Square and said, "You fellows can't stand here. You are blocking the roadway and * * * the pathway" (R. 82, 84). Gelles yelled, "Oh, you fascist cops. You think you can get everything and do anything you want" (R. 83). Asked twice more to move on, Gelles refused, and was then placed under arrest (R. 83). Moments later, Knoll observed the defendant Kyllingstad on the sidewalk of the Square "in a very loud conversation * * * with a sergeant" (R. 83-4). She slapped the sergeant, whereupon Knoll placed her under arrest (R. 84).

Patrolman **Joseph McNulty** testified that after the conversation between the police captain and the speakers, the defendant Meisner began "running around Duffy Square Park calling to others, shouting that they did not have to leave; that they could stay" (R. 46). McNulty approached Meisner on the sidewalk of the Square and told him to move on, whereupon he refused and was placed under arrest (R. 46-7). After the order to disperse, the defendant Jerome, carrying an American flag, began "running from one group to another," shouting that the "Fascist police" had no right to stop them. "As the mounted patrolman would disperse a group, the defendant Jerome, with the flag, would run behind the horse and call to others" (R. 47-8). Ordered to move on, Jerome said "no" and was then arrested (R. 48).

Patrolman **Herbert Engelhardt** testified that after the crowd was told to disperse, he observed the defendants Kunis and Chadwick on the sidewalk being told to move on (R. 52, 55-7). Kunis then "ran out into the middle of Broadway and laid down" (R. 56). When policemen tried to move Kunis from the street, Chadwick yelled, "Leave him alone, fascists" (R. 52). Again told to move on, Chadwick then sat down on the sidewalk and when an officer attempted to pick her up, she bit him (R. 53). She was then placed in a patrol car (R. 53).

Meanwhile, the defendant Shallit was moving all over the area shouting, "Do not leave here * * * Come back. We have our rights. Don't give in to the police. They are fascists they have no rights" (R. 53). The witness briefly lost sight of her then "saw her again in front of about five

people. She was actually doing most of the shoving and pushing back at * * * police officers trying to move the people back'' (R. 53-4). She was then placed under arrest (R. 54).

Patrolman **Edward I. Fahy** testified that upon observing Kunis standing on the sidewalk of Duffy Square screaming, ''fascists, police brutality, gestapo,'' he told Kunis to leave the area whereupon Kunis ''ran out into the middle of Broadway and laid down'' in the second lane of traffic (R. 74, 75). Fahy went out to him and told him to get up (R. 74). Kunis ''continued to lay there. Traffic was getting backed up'' so Fahy, assisted by Patrolman Coffey, carried Kunis' ''limp'' body into a patrol car (R. 74).

At this point Fahy observed the defendant Eckhardt ''lying in the middle of Broadway''—also in the second lane of traffic (R. 74-5). The officer told him that if he did not get up, he would be arrested whereupon Eckhardt threw his arms up and said, ''Here I am'' (R. 75). Fahy then placed him under arrest (R. 75).

Patrolman **Andrew Coffey** testified that he assisted Patrolman Fahy in arresting Kunis after he lay down in the street (R. 59). At that time ''[T]here was a melee in Duffy Square itself and everybody was running around yelling 'fascist cops' '' including the defendant Rhoads who was standing on the sidewalk ''screaming at the top of his lungs'' for five or ten minutes (R. 60-61). Rhoads ran to the statue. Then observing Rhoads run to the statue area of the Square, Coffey followed him and told him to move on (R. 60-61). Rhoads refused, the officer repeated his order,

Rhoads again refused and was placed under arrest (R. 61). As the officer put Rhoads into a taxicab, assisting the police, the defendant Ostrow came from the Square into the street "yelling 'fascist cop' " and "making a lot of noise" (R. 62). Upon his refusal to be quiet, Ostrow was placed under arrest (R. 62).

The Defense

Phillip Luce testified that he was one of the organizers and leaders of the meeting at Duffy Square (R. 123). Somewhere between 100 and 150 people had gathered there. After the introductory speeches a police officer appeared and said that "this is an illegal meeting and has to be stopped immediately. You have no right to hold a meeting in Duffy Square" (R. 126). After the defendant Laub related to the crowd what the police officer had said, they did not move, and Laub continued to speak. Suddenly, two horses rode into the crowd, and the police began arresting those who were gathered on the steps (R. 127).

According to the witness, the group had been absolutely quiet until the police arrived on the scene (R. 134). There had been no diversion or interruption of vehicular traffic, and the entire assembly was in the Square, though it was possible that some people might have been in the street (R. 125-6, 134). Ten thousand leaflets had been printed and distributed around the city, announcing the meeting (R. 167).

Joseph Leliveld testified that he is a reporter for the New York Times who had been assigned to cover the meeting at Duffy Square on August 8. When he arrived shortly before 4 o'clock there was a net-work television car,

on the scene, but apparently the demonstrators had not yet arrived (R. 148). Then, a group of people with signs arrived and formed into ranks (R. 149). Signs were distributed and leaflets were circulated.

Early in the meeting, at which there were no more than 60 people, Captain McCallister stepped up and asked who had given them permission to hold the meeting in Duffy Square: "And I think his first words were, 'Hold this up. Who is giving you permission?' Something to this effect" (R. 150-51). Using the bullhorn, Laub responded, stating that they did not need permission (R. 151-2). The captain withdrew and after a short while returned, stating that if they did not disperse they would be subject to arrest for disorderly conduct (R. 154). "[A]t that point things got a little out of hand, because a number of people seemed to start making speeches" simultaneously, and "there were a lot of people that were just plain shouting" (R. 154, 163). When the captain's warnings were not heeded, about a dozen policemen plus two mounted policemen moved into the area and began dispersing the group (R. 155). A majority of the group actually moved out of the area, but about 20 tried to hold their ground. It was this latter group which the police began arresting (R. 155-6, 163-4).

The witness further stated, that although he was not sure, he did not observe any interruption of traffic prior to the arrival of the police on the scene (R. 156-7). Nor did he hear Captain McCallister at any time inform the group that vehicular and pedestrian traffic was being blocked by this demonstration (R. 159-60). He did see a girl hit a police officer with her fists (R. 160).

Albert Maher, a defendant, testified that he had been at Duffy Square to participate in and "speak at a meeting to protest the war being carried on now by the United States in Southeast Asia" (R. 168).

The defendant acknowledged having hit two horses, several times, both with a placard and his hand. He claimed to have done so in order to stop them from going into the crowd (R. 169-70).

Ten thousand leaflets had been sent out to advertise the meeting, and about 100 people were in attendance (R. 172). Bullhorns were used to amplify the speakers' voices (R. 173).

Theodore Ostrow, a defendant, testified that he had gone to Duffy Square to attend the meeting (R. 174-5) where about 80 or 100 people had assembled. When he arrived, Miss Shallit handed him a black armband so that he could be identified as a monitor in the demonstration (R. 174). He was to make "sure that the participants in the meeting would stay within the Duffy Square area and would not go into the street; and if any disorders I could handle did break out, I should try to subdue any ruckus or yelling, or what have you" (R. 174-5).

The defendant stated that he was arrested about three or four minutes after the police horses arrived (R. 176). He was maintaining his position in the Square, although moving "to avoid the horses, which were charging in about every direction," when he saw the defendant Miss Kyllingstad being taken half-dragged and half walking" to a pa-

trol car or taxicab (R. 176). A personal friend of Miss Kyllingstad, he walked over to the officers and informed them that she could not be arrested, because she has a young baby (R. 177, 179). The officer replied that they would "take care of that later" and the defendant was then shoved backwards towards Duffy Square Park into a group of two or three officers where he was held and then "shoved by them again almost into [his] original position" (R. 177). He was then taken to a taxicab, and placed under arrest (R. 178).

Jeremiah Teahan, a defendant, testified that he had gone to the meeting "to hear what the May 2nd Committee had to say in regard to the foreign policy of the United States in Southeast Asia" (R. 184).

Prior to his arrest he had walked to where the defendant Kunis was lying on the sidewalk (R. 186). The defendants Chadwick and Eckhardt were also there (R. 185). Kunis was carried to a car, where he was joined by Eckhardt (R. 186-7). Teahan "then went down further [and] was pushed away from there by several policemen" (R. 187). Down further, where Copeland was being taken to a squad car, Teahan claimed he was then pushed "out of the way * * * into the street" by Captain McCallister, whereupon a policeman told him to "Get out of the street" (R. 187, 188). Another policeman then pushed him back onto the sidewalk where he stayed until still another policeman asked him what he was doing there. He replied that he was trying to stay away from the horses. "In the confusion, somehow or other, someone pushed" him back into the road, in front of a squad car (R. 188). A policeman grabbed him from behind and took him to a taxicab, where the de-

fendants "Key Martin and possibly Apter, had been already along with Patrolman Walsh" who then "proceeded to punch (Teahan) in the mouth, with two witnesses present" (R. 188-9).

Key Martin, a defendant, testified that he was at Duffy Square on August 8, "to speak on behalf of Youth Against War and Fascism, at a rally opposing the United States War in Vietnam and opposing what seemed at that time to be the imminent expansion of that war" (R. 192-3).

Because of his concern for his fellow-peakers, Copeland and Meisner, he followed them after they had been led away by the police (R. 193). A minute later, an officer asked if he wanted "to go too" and together with another policeman, took him to a cab (R. 193).

Robert Apter, a defendant, testified that Patrolman Walsh warned him that if he did not move he would be arrested (R. 201-02). A few seconds later, while he was "urging people to stay there and to re-group and have a peaceful meeting" Patrolman Walsh grabbed him and said, "I told you to move. You are under arrest" (R. 202).

On cross-examination, the defendant acknowledged that he had been running around and screaming, and that after the police would tell people to move on, he would tell them to stay (R. 203-4).

Bruno Eckhardt, a defendant, testified that he attended the meeting in Duffy Square as part of a puppet theater group (R. 205). Their equipment included a four-head soldier puppet, which was held by two men wearing skull masks, and a big kettle drum, which the defendant played

but which he stopped playing when told to by the officer (R. 206).

He observed Kunis being carried to a patrol car after Kunis had sat down on the sidewalk (R. 207). Eckhardt followed him, opened the door and sat down next to him (R. 207). It was not until he was in the station house that he learned he was under arrest (R. 207-8).

Joyce Chadwick, a defendant, testified that she is a friend of the defendants Eckhardt and Kunis, and had come to the meeting with them (R. 213-14, 216). She and Kunis were standing on the steps to the south of the statue when the police approached (R. 215-16). Kunis "walked down, off the steps, onto the sidewalk and sat down on the sidewalk, not in the street" (R. 215).

The defendant acknowledged that she did try to bite officer Engelhardt, but she did not believe she had punched him (R. 210). She further stated that she did nothing after the officer told her to move off the steps (R. 218, 220).

Ann Kyllingstad, a defendant, testified that she did strike a police officer on the back. This occurred while the defendant Laub was being placed under arrest (R. 230-32). Several officers had approached her and said "Come on, Miss, if you do not move on you will be arrested" (R. 234).

Arthur Kunis, a defendant, testified that at the time of his arrest he was sitting in the vicinity of the flagpole, on the west side of Duffy Square (R. 222-3). The horses had been "turning in circles around, knocking people all over, and policemen on the horses swinging their clubs at people" (R. 223). Upon witnessing this, the defendant felt that he "had no other recourse but to sit down and refuse

to cooperate." When the police arrived he "went completely limp and laid down" on the sidewalk (R. 224-5). He denied yelling or screaming (R. 228).

Pierre Meisner, a defendant, testified that after the police orders to disperse, he began shouting "Let them speak" (R. 236) and may have shouted "That they did not have to leave" (R. 237-8). He denied being told by an officer to leave the area (R. 238).

William Turner, a defendant, testified that he had been assigned as a monitor at the meeting—at which possibly 100 people were in attendance—to maintain order, allow for pedestrian traffic and keep people out of the street (R. 239-40).

The crowd (including the defendant) has been chanting "Let them speak," apparently determined "to drawn out * * * any further orders" when, after about a minute and a half, the captain left the scene and "suddenly, the patrolmen and the horses came from each side of the Square, behind the monument; and they appeared to charge headlong into the center of the crowd, and then began to move around, forcing people off the sidewalks on either the west or the east side of Duffy Square" (R. 241-2, 244-5). The defendant walked up the steps, holding his placard up, saying nothing (R. 242). On several occasions he was moved, but he continued to hold his "placard up to the people to see what I was there for" (R. 242). Finally, he was taken to a car (R. 242-3, 247).

The defendant denied ever screaming "Fascist police" or "Leave her alone" (R. 245).

Summary of Argument

Choosing for assembly an area wholly unrelated to its purpose, but calculated to obtain the dramatic publicity inherent in a major disruption of that area, petitioners and several hundred others gathered in Times Square on a busy afternoon. Spilling into the roadways, menacing the safety of vehicular and pedestrian traffic, the group was asked repeatedly by the police to disperse.

Petitioners refusal to do so constituted a violation of New York Penal Law Section 722, Subdivision 3. As construed, that provision punishes refusal to obey an order to move on only if that order is based on serious and substantial interference with normal commerce. The police action here, pursuant to that statute, was a classic instance of the neutral regulation of time, place and manner of public demonstrations that this Court has consistently deemed constitutional. Wholly unsupported in the record is petitioners' bald allegation that hostility to petitioners' views motivated the arrests.

Even should this Court hold unlawful the police order to move on, the chaotic excesses of petitioners' conduct in the course of refusing that command amply justified their conviction of Section 722, Subdivision 2. Sharply circumscribed by New York courts, that provision proscribes only substantial disturbance and annoyance to others. Struggling to avoid the consequences of their tumultuous behavior after the order to disperse, petitioners claim that these acts were not charged in the complaint; examination of the complaint, however, reveals that petitioners had full and fair notice of these charges.

POINT I

New York's disorderly conduct statute, as construed by its courts and as applied here, does not infringe upon the rights of the defendants under the First and Fourteenth Amendments.

Heralded by the distribution of 10,000 leaflets, a political protest meeting was unwisely held at 4 p.m. on an August Saturday on a small concrete island known as Duffy Square, located in the middle of the north end of Manhattan's busiest hub, Times Square. Although initially peaceful, the gathering was too large, attracting hundreds of persons who, quite naturally, began to spill off the narrow confines of the island into the vehicular roadways which surround it. Pedestrian traffic was forced to circumnavigate the protesters. Automobiles swerved to avoid the pedestrians in traffic lanes. People were unable to get to the bus stop located on the island. The curious stood by the thousands, according to police estimates, congregating around the square to observe the scene. Thus, a classic instance of interference with the normal flow of pedestrian and vehicular traffic developed, endangering life and limb as well as disrupting the orderly commerce of a thronged municipal quarter.

Presented with this dangerous situation, the police acted wisely and with restraint, repeatedly approaching the leaders of the group and directing that the meeting on Duffy Square be disbanded. Out of the petitioners' response to this obviously necessary and perfectly proper direction arose their arrests. According to the police accounts credited by the fact finder, each of the present petitioners reacted in a manner calculated to provoke disturbance. Not

only did they refuse to disperse, but they loudly exhorted the crowd to stand fast, inveighed against the police with cries of "fascist" and "gestapo," slapped police horses, assaulted police officers, and rushed into the roadway to form human traffic obstacles. For this active and aggressive resistance to the lawful efforts of the police, they were arrested, tried and convicted. They now attack those judgments on constitutional grounds.

Penal Law, Section 722(3)

Petitioners' willful failure to obey the police order to move on constituted a violation of New York Penal Law Section 722, Subdivision 3. As construed by the New York courts, this law punishes only the refusal to obey a reasonable order [*People* v. *Galpern*, 259 N.Y. 279 (1932); *People* v. *Nixon*, 248 N.Y. 182 (1928); see *People* v. *Penn et al.*, 48 Misc. 2d 634 (App. Term, 1st Dept. 1964), aff'd 16 N.Y. 2d 581 (1965), *cert. denied* 383 U.S. 969 (1966). The criteria of reasonableness are the necessities of the situation in which the order was issued. Illustrative of New York's construction of the "reasonable order" is the Court of Appeals' decision in *People* v. *Feiner*, 300 N.Y. 391 (1950), upholding defendant's conviction under Subdivision 3. Addressing a sidewalk crowd of about seventy-five people, Feiner several times refused to move on when ordered to do so by a policeman. Deeming the order lawful, the Court of Appeals relied upon the evidence that the crowd "filled the sidewalk and spilled out into the adjacent thoroughfare, obstructing or impeding both pedestrian and vehicular traffic" [*id.* at 400], and that defendant's speech "inflamed and agitated" the audience to the point that "violence was threatened" [*id.* at 402].

That judgment was reviewed by this Court in *Feiner* v. *New York*, 340 U. S. 315 (1951). There, considering for the first time the constitutionality of a "move on" statute, this Court affirmed the conviction, relying, as did the high court of New York, on the traffic disturbance and inflammatory nature of defendant's speech.

More recently, this Court addressed itself to a "move on" statute in *Shuttlesworth* v. *Birmingham*, 382 U. S. 87 (1965). Defendant there was convicted under a Birmingham ordinance setting forth two separate and disjunctive offenses: (1) obstruction of free passage on a sidewalk or street; (2) failure to obey a police order to move on. Deeming unconstitutional the latter provision because it allows a person to stand on the sidewalk "only at the whim of any police officer" [*id.* at 90], this Court reversed the conviction on the ground that it might have been based on the unconstitutional part of the ordinance (the trial court had rendered no opinion).

However, while striking down the Birmingham ordinance, the Court observed that two years after Shuttlesworth's conviction, the Alabama Supreme Court, in another case, had construed the ordinance to read in the conjunctive so that failure to move on was not punishable unless the accused was " 'blocking free passage' " [*id.* at 91]. All members of this Court—as expressed in the majority opinion and the three concurring opinions—agreed that the Birmingham ordinance, as thus construed by the Alabama courts, was constitutional. As noted by Mr. Justice FORTAS in his concurrence:

> "[I]f there were a rational basis for charging Shuttlesworth with violating the section as so construed,

> he could be retried if Alabama should choose so vigorously to protect the sidewalks of Birmingham. Civil rights leaders, like all other persons, are subject to the law and must comply with it. Their calling carries no immunity. Their cause confers no privilege to break or disregard the law" [*id.* at 100].

Supporting the *Feiner* decision and the *Shuttlesworth* dictum is a sound and moderate "accommodation of opposing interests",* which supports as well the determination of the New York courts herein. While the highly valued First Amendment right of expression must never be defeated, the time, place, and manner of its exercise are subject to minimum regulation in the interests of demonstrable requirements of public safety and freedom of movement [*Hague* v. *CIO*, 307 U. S. 496 (1939); *Schneider* v. *State*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); *Cox* v. *Louisiana*, 379 U. S. 536 (1965)]. There can be no absolute dogma that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please" [*Adderley* v. *Florida*, 385 U. S. 39, 48 (1966)]. Fire marshals, for instance, could certainly halt a meeting in premises unsafe for their use. Free exercise of the right of speech yields to prevention of the collapse of the floor.

So, too, assurance of the "safety and convenience" of persons on the public ways has long been deemed a value of sufficient importance to warrant regulation of public

---

* Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L. Jour. 877, 947 (1963).

assemblies [*Cox* v. *New Hampshire*, 312 U. S. 569, 574 (1941)]. Ordinary commerce and the normal use of public thoroughfares are the modest marks of a peacetime community. Abrogation is not dictated by the freedom of the public to assemble. For assembly, regardless of how large, need not interfere with the flow of commerce, unless its organizers intend it to do so. Here, in selecting Times Square, a spot wholly unrelated to the purpose of the meeting, the sponsors must have chosen the place not for its suitability for assembly, but rather because they could reasonably expect to attract attention, perhaps draw a crowd, and, hopefully, create a newsworthy snarl. The greater their success, the greater the reasonably anticipated interference with the commerce of Times Square. Such intentional obstruction is not a constitutionally guarded privilege, subsumed by the protections of speech, assembly, or even petition for redress of grievances. There is no conflict of values here. Unlike revolution, bona fide oral expressions of political dissent can be easily accommodated within a peaceful community.

Of course, not any or all police regulation in the name of traffic control justifies dispersal of a public assembly. Minor inconveniences, obstruction of momentary duration —frustrations expected and constantly encountered by the modern urban dweller under ordinary circumstances—do not call for police interference with the bothersome activity. It is, rather, the substantial, the hazardous—the "hard core" [*Shuttlesworth* v. *Birmingham*, *supra* at 99 (BRENNAN, J., concurring)]—obstruction, afflicted on their fellow citizen by demonstrators, that justifies the police order to disperse.

The facts of the instant case evidence that degree of interference with "safety and convenience" [*Cox* v. *New Hampshire*, *supra* at 574] which justifies police action. At New York's central intersection at a busy time, petitioners' assembly overflowed the sidewalks into the roadway, causing oncoming automobiles to "veer sharply" (R. 12). The safety hazard caused by the swerving automobiles—to other vehicles, to demonstrators in the street and to other pedestrians forced into the street—is obvious. Nor was the inconvenience to pedestrians minor. In addition to having to walk out in the roadway of a major thoroughfare, pedestrians' access to a bus stop on the Square was obstructed. Indeed, petitioners' assembly here was an enactment of this Court's illustration of street activity properly subject to dispersal by the government:

> "Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement" [*Cox* v. *Louisiana*, 379 U. S. 536, 554-5 (1965)].

The petitioners insist, however, that the police efforts at dispersal were "pre-determined," to effectuate a ban on meetings of "political dissent" in the midtown area and wholly unrelated to traffic considerations (brief, pp. 5, 15). Were these allegations borne out by the record, a patently obnoxious case of arbitrary official restraint of cherished rights would be presented. The record, however, contradicts the assertion. Even the petitioners' own witness quotes the police officer as announcing a non-discriminatory ban on all meetings in the mid-town area, and sug-

gesting the group move south of 40th Street or north of 59th Street (R. 144, 200, cited by petitioners).

Moreover, the People's testimony clearly established that far from "pre-determined," the police action was an on the spot "estimate of a particular local situation" [*Feiner* v. *New York, supra* at 321 (concurring opinion, FRANKFURTER, J.)], and that the resulting order to move on was dictated exclusively by traffic and safety factors (see R. 9, 77, 97, 110). Indeed, during the half-hour period prior to the order to disperse, as numerous demonstrators collected on and near the Square, unfolding placards and setting up effigies, several of the arresting officers stood by, at no time stating to the group that demonstrations were banned in that area (R. 4, 5, 30, 107).

Wholly distinguishable are the two recent cases upon which petitioners primarily rely, *Cox* v. *Louisiana, supra,* and *Edwards* v. *South Carolina,* 372 U. S. 229 (1963). Those cases, like the present one, concerned convictions of persons engaged in a protest meeting under a statute punishing the failure to obey police orders to move on. Similarity, however, ends here. Each of those convictions was reversed because the "move on" statutes as construed by the South Carolina and Louisiana courts were "so generalized" as "to make criminal the peaceful expression of unpopular views" [*id.* at 237; *Cox* v. *Louisiana, supra* at 551-2]. In contrast, the high court of New York in *Feiner* firmly rejected use of Section 722, Subdivision 3 as a tool "to silence unpopular opinions" [*People* v. *Feiner, supra* at 401].

Nor does the record here contain any evidence that the police orders were issued because the views of the demonstrators were "opposed to the views of the majority of the

community'' [*Edwards* v. *South Carolina, supra* at 237]. Petitioners baldly assert that the record establishes that the police orders were ''motivated by hostility to * * * [their] unpopular views'' (brief, p. 15), but they cite no support in the record for this declaration, nor could they.

Additionally, in *Edwards,* this Court found ''no obstruction of pedestrian or vehicular traffic'' within the area in question [372 U. S. at pp. 231-2]. And, in *Cox,* this Court observed that the demonstrators ''did not obstruct the street'' [379 U. S. at p. 541].

Penal Law, Section 722(2)

Further, even if this Court deems unlawful the police orders to disperse in the instant case, thus voiding the conviction under Subdivision 3, the subsequent acts committed by defendants in the course of their refusal to move on brings their conduct within the scope of Subdivision 2 of the statute.

That subdivision, as construed by the New York courts, proscribes conduct causing ''serious annoyance'' to others [*People* v. *Carcel,* 3 N.Y.2d 327, 331 (1957); see *People* v. *Perry,* 265 N.Y. 362 (1932); *People* v. *Most,* 171 N.Y. 423 (1902)]. In contrast to generalized breach of the peace statutes like that of South Carolina condemned by this Court in *Edwards* v. *South Carolina, supra* at 237, Subdivision 2 of Section 722, like Subdivision 3, has been ''limited to define and punish specific conduct lying within the domain of state power'' [*Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 573 (1942)]. Illustrative of the narrow compass of Subdivision 2 is the New York Court of Appeals reversal of two leaflet distributors' conviction under this provision

because the evidence showed "only * * * that the defendants were blocking the pedestrians' right of way" [*People v. Carcel, supra* at 332].

In sharp contrast to that mild disturbance, the evidence in the present case established that after the police had several times requested the demonstrators to move on, petitioners purposefully agitated the gathering in the Square, into a disorderly mob. Understandably, defendants never—neither in the state courts nor in this Court—challenged the People's proof under Subdivision 2. Their sole claim as to the application of this provision to their acts after the police order to disperse is that due process was violated because the complaint gave "no indication that any of them was charged with any * * * matters occurring after the [police] order" other than their "failure to move on" (brief, p. 12).

However, the distinction petitioners attempt to draw between their failure to obey the police order and subsequent acts is specious, for, as the opinion below in the Appellate Term observed, the totality of petitioners' conduct "after the order is material and proper in showing the failure to obey it" (R. 294). For example, after the order to disperse, some petitioners sat down on the sidewalk and some lay down in the street. This conduct in itself was the "failure to obey the dispersal order" which petitioners concede is properly charged in the complaint. Petitioners' attempt to separate the act of failure to move on and these disorderly acts offends sound reason.

Moreover, the language of the complainant, as the Appellate Term properly noted, fully embraces their behavior after the order to disperse. The complaint states that:

> "The defendants did unlawfully congregate and assemble at the above location [Duffy Square] obstructing the area to the exclusion of those wishing to use same, and did delay vehicular traffic while carrying placards and using loud and boisterous language; by their actions did cause a crowd to collect; when ordered to move on the defendants did fail to do so, after being informed that their actions were not lawful." (R. 1)

Clearly, petitioners had fair notice that all of their "obstructions" and "boisterous" acts at Duffy Square were the subject of the complaint. Dispelling any question as to the scope of the complaint is the heading, charging the time in question as "4:25 p.m." This was fully twenty minutes after the first police order to the crowd that they disperse and nearly ten minutes after additional policemen were summoned to the scene (R. 5, 90, 107, 112). Petitioners' eruption into riotous behavior, it will be recalled, began when the additional police assistance arrived. Unquestionably, then the complaint adequately notified petitioners that they were charged with the full extent of their conduct on the day in question.

In sum, the police order to disband was reasonable, dictated by those demands of safety and proper use of public streets which have long and wisely governed regulation of the time, place and size of assemblies. Failure to obey the order is itself a punishable offense. In addition, where, as here, the manner of disobedience creates an annoyance and further disorder, it is punishable as well under a separate, clear, and express prohibition. Therefore, neither the police order, nor the petitioners' arrests and convictions for disobeying it, infringed upon the constitutionally guar-

anteed right to gather in an appropriate place to express political dissent and grievance. Neither the rights of speech nor of free public passage need suffer by the warranted police conclusion that Times Square is not a proper meeting hall for a crowd of the size which congregated there on an August Saturday afternoon.

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
FREDERICK P. HAFETZ
Assistant District Attorneys
Of Counsel

March, 1967